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Nos. 13-354 and 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL., *Petitioners*,
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF ELECTRIC MIRROR, LLC., JAMES V. MISCHEL, JR., JAMES V. MISCHEL, SR., SUSAN MISCHEL, AARON MISCHEL, AND MIA MISCHEL, AS AMICI CURIAE IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD, ET AL.

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QUESTION PRESENTED

Whether the religious owners of a family business, or their closely-held business organization, have rights to the free exercise of religion protected by the First Amendment to the U.S. Constitution and by the Religious Freedom Restoration Act of 1993 that are violated by the application of the contraceptive coverage mandate of the Patient Protection and Affordable Care Act of 2010.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This *amici curiae* brief is submitted in support of Conestoga Wood Specialties Corp. and Hobby Lobby Stores, Inc.[1] *Amici curiae* James "Jim" V. Mischel, Jr., Aaron Mischel, and Mia Mischel, and their parents Susan "Faith" Mischel and Dr. James "Doc" V. Mischel, Sr. (collectively "the Mischels"), are a family of devout Christians who sincerely believe that their Christian faith must direct and control every aspect of their lives, including their calling to be the owners and operators of their closely held family business, amicus Electric Mirror, LLC. These amici believe it is a grave sin to participate in or facilitate the taking of innocent human life,[2] including through abortion and abortifacient drugs. Their sincerely held religious beliefs about the sanctity of human life propelled Doc and Faith Mischel to adopt Aaron from his biological mother, a fourteen-year old woman who had been a victim of rape and who had initially sought an abortion before agreeing to Aaron's adoption by the Mischels.

This Court's decision in these two cases will have a profound impact upon the Mischels and Electric Mirror. Should this Court embrace the government's position that the protections for the free exercise of religion guaranteed by the First Amendment and by

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[1] In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief are on file with the Clerk.

[2] *See, e.g.*, Proverbs 6:16-19.

the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, do not extend to for-profit entities, amici will be forced by federal regulations promulgated under the Patient Protection and Affordable Care Act of 2010 ("ACA"), 42 U.S.C. § 300gg-13(a) *et seq.*, to provide coverage for abortifacient contraceptives in violation of their deeply held religious beliefs. Amici will also face the imminent prospect of being compelled to provide coverage for voluntary surgical abortion under the requirements of HB 2148 presently being debated in the Washington state legislature.

The Mischels own, operate, and control Electric Mirror, L.L.C., a manufacturing company organized as a Washington limited liability company in 1998. Founder and President, Jim Mischel, Jr. launched Electric Mirror in his parents' garage. At that time, family and workforce were one and the same. Today, Electric Mirror employs more than two-hundred people in the United States and has annual sales of more than $40,000,000, but remains a family endeavor: Jim is President; Aaron is Vice President of Sales; Mia is Vice President of Community Relations; Faith is a Vice President; and Doc serves as Chairman and Vice President of Research and Development. With Jim Mischel as the single member of the LLC, Electric Mirror is "disregarded as an entity separate from its owner for income tax purposes" according to the Internal Revenue Service. *See* Treas. Reg. § 301.7701-3(b)(1)(ii) (2014). All of Electric Mirror's profits and losses thus pass through the business to the member who reports the profits or losses on his individual federal tax return.

Shortly before setting up Electric Mirror as an LLC in 1998, Jim Mischel drafted a Statement of

Faith for the company that was signed by every member of the Mischel family. The first line proclaims the company's and family's "firm belief that faith impacts all of life." The Statement dedicates Electric Mirror to God and "establish[es] the principles by which our company will be managed and operated." Those expressly religious principles define how Electric Mirror will make its products ("As stewards we are required to create quality products that reflect integrity and commitment to our customers."), will treat its customers (with the "utmost respect" as "being created in the image of God"), and will care for its employees ("[O]ur workman are worthy of their hire" so Electric Mirror will provide an "average or above average salary" and will "take every effort to provide our employees with an excellent health and education plan"). The Statement of Faith governs even Electric Mirror's profits: "our company commits itself to supporting the Christian church and the Christian community ... by giving 10% of our company's taxable profits to further the Kingdom of God and fulfilling the Great Commission" including the support of "Christian pro-life organizations" among other enumerated Christian causes. The Statement of Faith concludes by emphasizing that the very idea of a vocation, a calling, originates not from business imperatives but from religious faith:

> The Great Commission is everyone's calling. Therefore, our company reflects Christ in deed and word. ... This mission is part of who we are in Christ.

Since moving out of the Mischels' garage in 1998, Electric Mirror has honored this faith commitment by (among other things) providing its employees with

above average wages and generous health benefits (Electric Mirror pays 75% of the premiums as well as covering half of the plan's deductible and out of pocket expenses), making no-interest loans to employees in distress, limiting overtime to one hour per day so employees have time with their families, and offering educational classes to employees (including personal finance and ESOL training).

Electric Mirror's faith commitments are evident even in the products that it creates. Every product is of high quality and ships with a decal affixed quoting Deuteronomy 8:18: "But thou shalt remember the Lord thy God: for it is he that gives you the power to get wealth, that he may establish his covenant which he swore unto your fathers, as it is this day."

Electric Mirror and the Mischels have remained true to these sincerely held religious beliefs, even when faithfulness comes at great cost. In 2012, Electric Mirror moved from purchasing employee health insurance on the open market to a far more costly self-insurance regime. This change has been necessary to escape an impending Washington law mandating that all health plans covering maternity services must also cover voluntary abortion. As discussed further infra, such self-insurance may offer a temporary respite from Washington's abortion coverage mandate, but it affords no shelter from the abortifacient contraceptive requirements of the federal contraceptive mandate under the ACA. Should this Court embrace the government's erroneous position here that the free exercise of religion is inapplicable to for-profit organizations, amici would have no independent right to protection against application of the state's abortion coverage mandate to them.

Such an outcome would be abhorrent to the religious values that are foundational for the Mischel family and for Electric Mirror. The entire Mischel family has been active for decades in defending the sanctity of human life. These religious beliefs led Doc and Faith Mischel, while Doc was in dental school, to accept the challenge from a nurse at a local abortion clinic to adopt a child whose mother was a fourteen-year old rape victim. Even though they had no way to pay for the adoption or for the child's delivery, Doc and Faith immediately said "yes." They borrowed funds to adopt the child they would name Aaron. To compel Aaron, as Vice President of Electric Mirror, his family, and Electric Mirror to pay for and provide insurance coverage that violates their religious beliefs and that could have resulted in Aaron's life ending before the Mischels' could have adopted him is contrary to the free religious exercise guaranteed by the First Amendment and by RFRA.

Amici therefore respectfully request that this Court hold that for-profit organizations and their owners are protected by the Free Exercise Clause of the First Amendment and by the Religious Freedom Restoration Act. Amici respectfully submit that the judgment in *Hobby Lobby* should be affirmed and the judgment in *Conestoga Wood* should be reversed.

ARGUMENT

I. FOR-PROFIT CORPORATIONS AND THEIR OWNERS, SUCH AS AMICI HERE, ENGAGE IN THE EXERCISE OF RELIGION WITHIN THE MEANING OF RFRA AND THE FIRST AMENDMENT.

The Mischel family established Electric Mirror as a direct outgrowth of their strongly held religious faith and its teachings on the importance of the family. Their shared Christian faith guides and controls every aspect of their lives – from Doc and Faith Mischel's decision to adopt Aaron from a mother who had initially pursued an abortion, to Jim Mischel's starting Electric Mirror in the family garage, to the Statement of Faith for Electric Mirror that Jim prepared and every family member signed before setting the company up as a Washington LLC, to the involvement of each member of the family in the regular operations of the business. For these amici, all of these actions are the exercise of their religion no less than their attendance at church worship services or evangelistic religious speech.

The government would have this Court believe that companies like the Mischel family business Electric Mirror are aberrational and legally impossible. The government would have this Court believe that individuals and families cannot exercise their religious faith together in the organization and operation of a business and that a for-profit corporation cannot engage in any exercise of religion whatsoever. But it is the government's categorical exclusion of for-profit corporations from free exercise protections that is contrary both to fact and law.

The government agrees that individuals can and do exercise religion. Pet. Br. 16-17, No. 13-354. The government further acknowledges that this Court has entertained free exercise claims by businesses engaged in such commercial activities as the sale of goods and the operation of a carpentry business with employees, but it seeks to limit such claims on the grounds that the businesses were sole proprietorships. Pet. Br. 17-18 (*citing Braunfeld v. Brown*, 366 U.S. 599 (1961), *and United States v. Lee*, 455 U.S. 252 (1982)). The government also admits that corporations can engage in religious exercise, but contends that this is true only of nonprofit corporations, such as churches and religious communities, not for-profit corporations. Pet. Br. 17. The government attempts to justify these distinctions on the grounds that for-profit corporations are organized to engage in commerce and seek to make a profit, rather than pursue religious purposes. Pet. Br. 19.

A. The Differences Between For-Profit and Nonprofit Corporations Do Not Support the Government's Categorical Denial Of Free Exercise Rights to For-Profits.

Upon close examination, the government's distinctions among these different structures and its stated justifications for its position turn out to be arbitrary and unconvincing. In particular, the government's heavy reliance upon the distinction between for-profit and nonprofit corporation status fails for multiple reasons.

First, for-profit companies can and do engage in activities that the government must admit are religious in nature. As just one example, amici here

include a Bible verse affixed to every product they have shipped. Other companies similarly have distributed religious scriptures to their customers.[3] Such communicative activities constitute core religious speech protected by both the Free Speech and Free Exercise Clauses of the First Amendment. Yet if these activities by these companies constitute religious exercise, it defies logic to contend, as the government does, that the companies are incapable of exercising religion within the meaning of the First Amendment and RFRA.

Second, the government appears to assume that for-profit businesses must have as their primary purpose making a profit and cannot have other purposes, such as religious ones, that may conflict with the profit motive. But in reality applicable laws enable for-profit corporations to have very broad purposes, and do not require that the only, or even the primary, purpose be maximizing profit.[4] Further,

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[3] For over 30 years, Alaska Air Group, better known as Alaska Airlines, America's seventh-largest carrier in terms of passenger traffic, handed out prayer cards with its in-flight meals, before ending the practice in 2012. *See* Nicole Neroulias, Alaska *Airlines ends decades-old prayer card tradition*, REUTERS, Jan. 26, 2012, at: http://www.reuters.com/article/ 2012/01/26/us-alaska-airlines-prayercards-idUSTRE80P03Y20120126. Since the 1980s, In-N-Out Burgers has printed a scripture citation on its packaging and cups. *See* Lynn Arave, *In-N-Out serves burgers with a side of scripture*, DESERET NEWS, Dec. 26 2009, http://www.deseretnews.com/article/705379755/In-N-Out-serves-burgers-with-a-side-of-scripture.html?pg=all.

[4] The Model Business Corporation Act provides that "[e]very corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation." Model Business Corporation Act §3.01. Most states permit, and the vast majority

to the extent that the government may contend that profit maximization is required, the strong state law trend actually runs in the opposite direction. For example, more than thirty states have adopted "constituency statutes" that expressly permit directors to take corporate actions that do not directly benefit the shareholders.[5] Similarly, a number of states have enacted statutes creating benefit corporations and low-profit limited liability companies ("L3Cs"), both of which are designed to provide additional vehicles allowing for-profit entities to pursue purposes other than profit-maximization.[6] And the federal tax code explicitly encourages activities other than the pursuit of profit by providing that up to ten percent of a corporation's taxable

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of corporations adopt, very broad purpose clauses. *See* Michael A. Schaeftler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN'S L. REV. 476, 482 (1984).

[5] *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85 (1999). For example, the Connecticut statute requires that a director "shall" consider not only the long-term as well as the short-term interests of the corporation, the shareholders, and its employees, but also "community and societal considerations...." *See* CONN. GEN. STAT. § 33-756 (2008). *See also* N.Y. BUS CORP. L. §717 (2008).

[6] Benefit corporations have the dual purpose to create general public benefit and create a profit for shareholders, and have been recognized in Maryland, California, Hawaii, Vermont, Virginia, New Jersey and New York. The L3C has the same liability protection and pass- through tax treatment as an LLC but has a primarily charitable purpose with profit making as a secondary purpose. Vermont, Rhode Island, Maine, Michigan, Illinois, North Carolina, Utah, Louisiana, and Wyoming recognize the L3C.

income is deductible as charitable contributions. *See* 26 U.S.C. § 170(b)(2).

Moreover, in the case of a closely held entity, such as amici here, the close or complete overlap between the shareholders and those controlling the company should allow them to pursue whatever lawful purposes they choose rather than being forced to maximize profits. In light of the pass-through tax treatment of the profits and losses of a subchapter S corporation or of a single member limited liability company such as Electric Mirror, the owners' right to determine whether or not they wish their business to maximize profits or to pursue other objectives must be entirely their own.

Amici provide a good example of such corporate religious exercise. Their closely held family-operated business was established expressly on the basis of their shared "firm belief that faith impacts all of life" and dedicated to God. Amici intentionally have made choices that reduce their profits in order to provide better wages, working conditions, and benefits to their employees or create better products for their customers. They have no less right to make choices that place promotion of the religious purposes described in the Electric Mirror Statement of Faith before maximization of their profits.[7]

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[7] In considering how companies may have mixed-profit-making and religious purposes, it is worth noting that the charter companies that established the first English colonies in North America were businesses expressly incorporated to carry out at the same time both religious and profit-making purposes. The most prominent example is the First Charter of Virginia, granted to the Virginia Company by the British Crown. It expressly stated the corporate purposes of the Company as to

Perhaps most importantly, though, the government's categorical standard misunderstands the crucial distinction between nonprofit and for-profit organizations. The critical difference is not *whether* the organization realizes profits, but rather *how* those profits may be used. Nonprofit organizations may also pursue and realize profits, but their profits must be applied to advance the organization's nonprofit purposes, and not for the benefit of any private individual.

Nonprofit corporations routinely operate hospitals, museums, colleges, conference centers, and the like, and engage in other activities that are commercial in character, produce income, and result in profits, often substantial. The Internal Revenue Code recognizes that even tax-exempt nonprofit organizations may engage in such commercial activities. *See* Treas. Reg. § 512(a)(1) (2014). Where such activities are directly related to advancing the organization's exempt purposes, such as a hospital charging fees for its rooms, a museum charging admission fees or selling copies of its collection in a gift shop, or a private college charging tuition, the organization can derive substantial profits without altering its nonprofit and exempt status. Even when such activities are unrelated to the organization's tax-exempt purposes, they do not threaten the organization's tax-exempt status unless they are

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"propagat[e] Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God" and "to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, ... And to have and enjoy the Gold, Silver, and Copper, to be gotten thereof...." *See* 1 HENING'S VIRGINIA STATUTES AT LARGE 56-58.

substantial. If insubstantial, such profits simply result in unrelated business income on which the nonprofit must pay tax.

The government never explains why this difference in the uses to which profits may be put is meaningful and justifies denying for-profits equal free exercise rights while granting such rights to nonprofits engaged in similar or identical profit-making activities. The government similarly overlooks the many examples of nonprofit organizations that engage in clearly commercial activities and that make substantial profits but nonetheless retain their nonprofit exempt status and therefore would satisfy the government's primary requirement to engage in religious exercise. One timely and telling example is that of the National Football League ("NFL"), which is organized as a nonprofit corporation and recognized as a tax-exempt under IRC §501(c)(6).[8] To qualify under §501(c)(6), a business or football league must not be organized for profit and no part of its net earnings may inure to the benefit of any private shareholder or individual. *See* 26 U.S.C. § 501(c)(6). Yet in 2012 the NFL claimed annual revenues of $255 million on assets worth more than $822 million, constructed new offices at a cost of $36 million, and paid its top employee, Commissioner Roger Goodell, $29.5 million in annual salary. During the same period, the NFL made grants to other nonprofit organizations in a total amount of only $2.3 million.[9] Despite commercial activity that

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[8] *See* Act of Nov. 8, 1966, Pub. L. 89-800, § 6(a), 80 Stat. 1515.

[9] *See* National Football League IRS Form 990 for Fiscal Year 2012, available at: http://www.guidestar.org/FinDocuments/2012/131/922/2012-131922622-0907a8cd-9O.pdf.

far exceeds that of amici here and most other for-profit companies and owners seeking to exercise their religious faith, it is instead corporations like the NFL that satisfy the government's nonprofit status requirement.

B. The Government Is Applying an Arbitrary and Erroneous Standard to Determine If a Corporation Is Engaged in the Exercise of Religion.

Applying the government's analysis to amici here vividly illustrates that it is arbitrary. It exalts form over substance and results in strangely inconsistent outcomes.

The government's position recognizes that the Mischel family *as individuals* can exercise religion in a variety of ways. For example, the Mischels can engage in religious speech such as evangelism or worship. And as employees of Electric Mirror, they can engage in religious exercise in the workplace sufficient to trigger Title VII's religious antidiscrimination and religious accommodation requirements.

The government also appears to concede that a sole proprietorship can exercise religion sufficient to support review under the Free Exercise Clause, even though engaged in the sale of products or the operation of a business. *See* Pet. Br. 18. Accordingly, had Jim Mischel established Electric Mirror as a sole proprietorship rather than a single member LLC, it would be similarly situated to the claimants in *Braunfeld* and *Lee* whom the government acknowledges were exercising religion.

Similarly, the Mischel family could incorporate as a religious nonprofit, using the same Statement of

Faith used in establishing Electric Mirror, and that nonprofit entity would be exercising religion under the government's view. In fact, such a nonprofit could engage in significant commercial activity, even giving rise to unrelated business taxable income under Treas. Reg. § 512(a)(1) (2014), yet, because it would retain its nonprofit status, by the government's standard it would remain capable of exercising religion within the meaning of RFRA and the First Amendment.

Consistent with the government's position, even if organized as a for-profit corporation, Electric Mirror could exercise a panoply of First Amendment rights other than free religious exercise, such as free speech. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342, 354 (2010); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). And even as a for-profit corporation, Electric Mirror, and the Mischels as its owners and managers, could engage in religious exercise to the extent that they could be found to have committed religious discrimination in employment in violation of Title VII.

Yet under the government's analysis, simply by electing to establish Electric Mirror as a for-profit limited liability entity, the Mischels have rendered Electric Mirror incapable of engaging in the exercise of religion and thus beyond the protections of RFRA and the Free Exercise Clause.

The government's categorical standard, which ignores a claimant's actual exercise of religion in favor of a bright-line one-size-fits-all rule, would result in wildly inconsistent outcomes depending upon modest differences in corporate form and the particular First Amendment right being exercised. Viewed in this light, it is clear that the government is applying the wrong initial analysis to assess free exercise claims. The correct initial inquiry is the well-established test under RFRA whether a claimant's objections are sincerely held religious beliefs that are burdened by the government's actions.

In the case of a closely-held entity such as amici, this is quite easily established. The government need only consider, as RFRA instructs, whether the claim by the company or its owners that their religious beliefs are being burdened by government action is sincere and not dishonest. Once that initial inquiry has been satisfied, the normal RFRA analysis can then consider whether that burden is substantial, whether the governmental interest at issue is compelling, and whether there is a less restrictive means to achieve a compelling governmental interest.

But if the government is asserting a bright-line rule because it is concerned about the potential for fraud or unprincipled and inconsistent manipulation of a business's corporate structure, such problems are easily addressed. The organization pursuing religious purposes can articulate those purposes (along with other corporate purposes) in its organizing documents, such as articles of incorporation, bylaws, mission statements, statements of faith (such as that of amici here), and the like. The government can make the neutral facial inquiry whether the organization holds itself out – to the public and

internally – as having religious purposes and engaging in religious activities. Indeed, this is essentially the approach used by the Ninth Circuit in *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

If the company is not closely held, it may also provide formal notice of its religious purposes, activities, and requirements to potential investors prior to any investment and in public corporate filings. Such notice of the corporation's religious purposes and statements of faith can be provided not only in the corporation's organizational documents, but also in corporate filings, in information provided to prospective investors, and on certificates evidencing any ownership interests. Such documents may state that maximization of shareholder profit is not the corporation's only or even primary purpose and that, in certain instances, the corporation's governing board may subordinate maximization of the corporation's short-term economic value in order to pursue the corporation's other stated purposes, including its stated religious purposes.[10]

Ironically, the government itself has already articulated the criteria that it considers sufficient to demonstrate that an organization is religious in promulgating its religious accommodation under the contraceptive mandate. Apart from the requirement, which amici challenge here, that the organization be

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[10] This approach has been used successfully and without incident by one of the few religious for-profit corporations to be listed on a public exchange. *See, e.g.*, DIDAX, Inc., Form 10K-B dated December 31, 1997, available at http://www.sec.gov/Archives/edgar/data/1037599/0000950133-98-000831-index.html.

a nonprofit, the accommodation regulations require only that a claimant need (a) hold itself out to the public as religious, (b) have a religious objection to compliance with the mandate, and (c) provide notice to those affected by its decision (that is, its employees, health insurance issuers, and third party administrators) that it has such a religious objection to the mandate. *See* Treas. Reg. § 54.9815-2713A (2014). Although amici disagree with the limited nature and scope of the remedy provided under this accommodation, this accommodation is compelling evidence of the elements that the government considers sufficient to establish that a claimant has sincere religious objections to the mandate.

II. THE GOVERNMENT'S CATEGORICAL DENIAL OF FREE EXERCISE RIGHTS TO FOR-PROFIT BUSINESSES WOULD PERMIT FEDERAL AND STATE GOVERNMENTS TO MANDATE ANY MEDICAL SERVICE, PROCEDURE, OR TREATMENT, INCLUDING ELECTIVE ABORTION.

If the government's categorical denial of free exercise protections to for-profit businesses and their owners is upheld, it is a single small step from requiring coverage for abortifacient contraceptives to requiring coverage for elective abortions. That single step is not a mere theoretical "slippery slope"; in the case of these amici and many others, it is imminent. Washington State, where Electric Mirror is headquartered, is poised to enact legislation, the Washington Reproductive Parity Act ("RPA"), HB 2148 (2014), that will require any health plan that provides coverage for maternity care or services to

also provide coverage for the voluntary termination of a pregnancy. For Aaron Mischel, whose life nearly ended in an abortion clinic, and for his adoptive parents and siblings, forcing their closely-held family business Electric Mirror to implement such a mandate would be a severe violation of their most deeply held religious beliefs.

The impact of the Washington Reproductive Parity Act is magnified by the fact that current federal law requires almost all employers to cover maternity services and requires all individual health plans to do the same. The Pregnancy Discrimination Act of 1978 42 U.S.C. 2000e(k), requires any business employing more than 15 persons to cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. This effectively encompasses all corporations in the large group market, all of whom are mandated by the ACA to provide insurance to their employees.[12] Additionally,

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[12] The ACA's employer mandate that requires "large employers" to offer their full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan or face an assessable payment, 26 U.S.C. § 4980H(a), applies to any employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year, 26 U.S.C. § 4980H(c)(2)(A). All of these employers are therefore subject to the requirements of the Pregnancy Discrimination Act of 1978 and must cover maternity care services whether they purchase insurance on the open market or self-insure.

section 1302(b) of the ACA defines maternity and newborn care as "essential health benefits" that must be covered by all non-grandfathered plans in the individual and small group markets both inside and outside of the ACA exchanges. In essence, federal law requires employers and individuals to provide health insurance covering maternity care while Washington State is poised to mandate coverage of elective abortion on businesses that provide the federally required maternity care in their federally mandated health insurance.

When the RPA was first introduced in 2012, amici were faced with the untenable choice either of violating their religious convictions by providing the objectionable coverage for elective abortions or of failing to offer Electric Mirror's employees health care coverage through a group health plan. To forestall the requirement to provide coverage for elective abortions, Electric Mirror implemented a self-insurance program. In doing so, it incurred substantially increased costs and embraced significant added potential risks[13] in order to avoid being forced to violate its religious beliefs under the impending Washington law.[14]

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[13] As one example, if multiple employees incur substantial medical costs in the same plan year, the added financial burden for covering such expenses could be more than Electric Mirror can pay.

[14] Subsection 8(a) of H.B. 2148 currently contains conscience provisions that purport to protect individuals and organizations who have a religious or moral tenet opposed to a specific service from being required to purchase coverage for that service. *See* H.B. 2148, 63rd Legislature § 8(a) (2014). However, the immediately following subsection 8(b) nullifies this apparent protection by stating that an objection under subsection 8(a)

But despite these increased costs and risks, self-insuring affords Electric Mirror no protection from the ACA's mandate to provide abortifacient contraceptives.[15] Nor will self-insuring protect Electric Mirror from being required to provide coverage for elective abortion in the near future if Washington State adopts the ACA's coverage mechanisms or the ACA is expanded to cover elective abortion.

If this Court embraces the government's position that corporations and their owners forfeit their free exercise rights when they enter into commerce for profit, businesses like Electric Mirror and families like the Mischels will be left with an untenable choice. On the one hand, they face violating their religious belief that as stewards they are called to support their employees and encourage families through providing generous health benefits and

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"shall not result in an enrollee being denied coverage of, and timely access to, any service or services excluded from their benefits package as result." The obvious conflict between these two subsections is acknowledged by the following subsection 8(c), which directs the State Insurance Commissioner to attempt to reconcile these conflicting provisions, but that has proved unworkable in implementing similar language in past legislation. Given the ambiguity and uncertainty attending these contradictory provisions, *amici* concluded that the only way to protect their sincere religious convictions not to provide coverage for elective abortions was for Electric Mirror to self-insure for so long as that option remains.

[15] The contraceptive mandate applies to all group health plans and any health insurance issuer offering group or individual health insurance coverage. 42 U.S.C. § 300gg–13(a). A group health plan is broadly defined as any plan established or maintained by an employer and that provides medical care including both purchased and self-insured plans.

maternity care. This is the same conviction that compelled Faith and Doc Mischel to provide a loving family to Aaron after his 14 year-old mother was raped and made the heroic decision to relinquish him for adoption). On the other hand, once HB 2138 is enacted, they face being forced to violate their religious belief in the inherent value and sanctity of all human life as a creation in the image and likeness of God, thereby compelling Aaron and his family to fund the very procedure that would have ended his life. Contrary to the government's assertion, the choice of exactly *how* the Mischels and Electric Mirror would like to violate their deeply held religious beliefs is no choice at all.

CONCLUSION

For the foregoing reasons, this Court should hold that for-profit organizations and their owners are protected by the Religious Freedom Restoration Act of 1993 and by the Free Exercise Clause of the First Amendment. Amicus respectfully submits that the judgment in *Hobby Lobby* should be affirmed and the judgment in *Conestoga Wood* should be reversed.

Respectfully submitted,

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